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9 RGIS, LLC (erroneously sued herein as
RGIS INVENTORY SPECIALISTS, INC.)

10 UNITED STATES DISTRICT COURT
11 NORTHERN DISTRICT OF CALIFORNIA
12 SAN FRANCISCO DIVISION

13 TRISHA WREN, ET AL.,

14 Case No. 3:06-cv-5778 (JCS)

15 Plaintiffs,

16 v.

17 RGIS INVENTORY SPECIALISTS, INC.,

18 Defendant.

**DEFENDANT RGIS, LLC.'S RESPONSE
TO OBJECTIONS TO DEFENDANT'S
EVIDENCE SUBMITTED ON REPLY IN
SUPPORT OF DEFENDANT'S MOTION
TO DECERTIFY COLLECTION ACTION**

19 Date: January 9, 2009

Time: 9:30 a.m.

20 Place: Courtroom A, 15th Floor

21 Honorable Joseph C. Spero

1 Defendant hereby responds to Plaintiffs' Objections to Defendant's Evidence Submitted
 2 on Reply in Support of Defendant's Motion to Decertify Collection Action. (*See* Dkt. 662).

3 **I. DECLARATION OF SUSAN B. BURR**

4 Plaintiffs object to portions of the Burr Declaration on the grounds that it violates Civil
 5 Local Rule 7-5(b) and Federal Rule of Civil Procedure 56(e). Plaintiffs essentially argue that
 6 portions of the declaration fail to comply with both rules because they do not "avoid conclusion
 7 and argument" and are not "made on personal knowledge." Interestingly, Plaintiffs cite to no
 8 Federal Rules of Evidence as grounds for excluding any portion of this declaration.

9 These evidentiary objections are without merit. No part of the declaration runs afoul of
 10 any federal rules. In fact, Plaintiffs have considerable temerity in proffering these evidentiary
 11 objections, as the Burr Declaration is nearly identical in form to the Declaration of Nancy Park
 12 Plaintiffs submitted with their response brief. (*See* Dkt. 611).

13 **A. Argumentative Headings**

14 The headings in the Burr Declaration mirror the Park declaration's headings. For
 15 example, the first three headings in the Park Declaration are: (A) All auditors perform the same
 16 job duties and use the same equipment; (B) RGIS is centralized and hierarchical; and (C) All
 17 auditors, assistant team leaders and team leaders are subject to the same written policies and
 18 procedures. The corresponding headings in the Burr Declaration are: (A) Response to Section A:
 19 All auditors perform the same job duties and use the same equipment; (B) Response to Section B:
 20 RGIS is centralized and hierarchical; and (C) Response to Section C: All auditors, assistant team
 21 leaders and team leaders are subject to the same written policies and procedures.

22 The headings in the Burr Declaration should not be stricken as they are directly responsive
 23 to the headings in the Park Declaration and are merely summarizing the evidence submitted
 24 therewith.

25 **B. Entire written paragraphs of argument**

26 Similarly, the alleged "paragraphs of argument" in the Burr Declaration Plaintiffs refer to
 27 are merely responsive to the corresponding paragraphs in the Park Declaration. They are not

1 argument, but merely summaries of the relevant evidence.¹

2 For example, one of the first objectionable “paragraphs of argument” Plaintiffs refer to in
 3 the Burr Declaration states as follows: “the ‘policy documents’ cited by Plaintiffs demonstrate,
 4 contrary to Plaintiffs’ contention, that Assistant Team Leaders and Team Leaders have a
 5 multitude of duties and responsibilities that are not shared with Auditors, such as scheduling,
 6 completing weekly reports, conducting pre-inventory briefings and quarterly Team Leader
 7 meetings, mentoring and training team members and other duties” – and then cites to evidence
 8 supporting this summary. *See* Burr Declaration (Dkt. 629), p. 2-3. This paragraph is directly
 9 responsive to the corresponding portion of the Park Declaration: “The auditors who were deposed
 10 confirmed that Assistant Team Leaders and Team Leaders perform the same job duties as
 11 auditors.” *See* Park Declaration (Dkt. 611), p. 7. The Burr Declaration is not argumentative just
 12 because it cites to evidences that contradicts the Park Declaration.

13 **C. Cells of text**

14 Plaintiffs summarily state, without explanation, that “numerous cells of text [in the Burr
 15 Declaration] are pure argument...and outside the personal knowledge of the witness.” Plaintiffs
 16 cited only to two pages in the Burr Declaration as being objectionable for this purpose. This
 17 argument is essentially the same as those above and can be rejected for the same reasons. The
 18 “cells of text” in the Burr Declaration are directly responsive to the “cells of text” in the Park
 19 Declaration. Burr’s Declaration responded to Park’s “analysis” of what these documents
 20 purportedly mean and added an additional column to several of Park’s charts to address Plaintiffs’
 21 inaccurate depictions of RGIS’ policies. Burr’s Declaration also responds to Plaintiffs’ selective
 22 compilation of internal and administrative charges in Paragraph 50 of Park’s declaration and
 23 Paragraph 31 of Lee’s declaration.

24 **D. “RGIS’s Response” Column in Tables Throughout the Declaration**

25 RGIS unquestionably has a right to respond to the “summary” of evidence submitted with
 26 the Park Declaration – especially considering that the Park Declaration cited to large amounts of

27 ¹ If anything, the evidence summary in the Burr Declaration is less argumentative than the version submitted by Ms.
 28 Park, which is nearly four times as long and takes a shocking amount of testimony and documentary evidence out of context.

1 testimony out of context. This response is not "commentary" nor outside the personal knowledge
 2 of the declarant.²

3 For example, Plaintiffs quote language in a letter produced by RGIS they identify as
 4 "Letter from U.S. Department of Labor, Wage and Hour Division Re Assessment of Civil Penalty
 5 (September 13, 2004)" (RGIS 27819):

6 RE: Assessment of civil money penalty for minimum wage and/or
 7 overtime violations Dear Messrs. Nicholson: This refers to the
 8 recent investigation of RGIS Inventory Specialists operations in
 Morrow, Georgia under the Fair Labor Standards Act (FLSA)
 9 which disclosed violations of the overtime pay and record keeping
 10 requirements of the FLSA. The violations occurred because the
 11 firm failed to count certain pre-shift time as work time thus
 12 resulting in unpaid hours worked and unpaid overtime pay. These
 13 violations resulted in underpayments totaling \$3,063.75 due to 31
 14 employees. I understand the firm agreed to comply fully with all
 15 the provisions of the FLSA in the future and has paid back wages
 16 to the affected employees. I take note, however, that similar
 17 violations have been encountered in previous investigations of the
 18 firm. In 1997, two investigations in New Jersey disclosed similar
 19 violations in total of \$11,525 back wages paid to 49 employees; in
 20 May 1999, violations were disclosed in a New York investigation
 21 with \$1,296 back wages owed to 1 employee; in June 2003, \$943
 22 back wages were owed to 16 employees in Alabama. Although no
 23 penalty was assessed to section 16(e) of the FLSA which provides
 24 for the assessment of a civil money penalty for any repeated or
 25 willful violation of section 6 or 7, in an amount not to exceed
 26 \$1,100 for each such violation.... (emphasis added).

27 RGIS responded with the following rebuttal:

28 Plaintiffs misquote the last paragraph of the letter. It actually says
 1 that 'Although no penalty was assessed as a result of the most
 2 recent investigation in Georgia, you should be aware that if at any
 3 time in the future the firm is found to have violated the monetary
 4 provisions of the FLSA it may be subject to such penalties.'
 5 (emphasis added). This investigation pertains to two RGIS districts
 6 which shared the same office in Johannesburg, Georgia. The
 7 investigation covered these districts' practices until mid-2004.
 8 RGIS did not have any knowledge of these alleged violations prior
 9 to receiving this notification. *See Declaration of Cynthia Myers in
 10 Support of Defendant RGIS, LLC's Reply to Plaintiffs' Opposition*

² Interestingly, Plaintiffs do not appear to object to all of RGIS' response columns, even though they are nearly identical to the so-called objectionable sections. *See, e.g.*, Burr Declaration, p. 43-56.

1 to Decertify Plaintiffs' FLSA Collective Action ("Myers Decl."),
 2 Ex. B (filed herewith).

3 Burr Declaration, p. 68-69. This response is proper because it cites to evidence that directly
 4 contradicts the misquoted language provided by Plaintiffs.

5 **E. Citation to Underlying "Evidence" From Managers Who Lack Personal Knowledge**
and Foundation for the "Fact" Statements Proffered Therein.

6 Plaintiffs offer no proof that these manager declarations are not based on personal
 7 knowledge or that they lack foundation. In fact, in each of these declarations, the affiant declares,
 8 under penalty of perjury, that "I have personal knowledge of the facts set forth in this Declaration
 9 and, if called as a witness, I could and would testify competently and truthfully to such facts
 10 under oath." Additionally, all of the declarations lay an adequate foundation for the testimony by
 11 describing their background with RGIS and the basis for their personal knowledge. Unless
 12 Plaintiffs can present some specific evidence impeaching these witnesses' credibility, then this
 13 attack on the declaration must fail as well.

14 **II. MANAGER DECLARATION TESTIMONY**

15 Plaintiffs' entire argument for the exclusion of these managers declaration is that their
 16 "identities...were not disclosed to Plaintiffs as part of the mandatory disclosure required under
 17 Fed. R. Civ. P. 26." As discussed in more detail in the accompanying Memorandum of Points
 18 and Authorities in Opposition to Plaintiffs' Motion to Strike Defendant's Evidence Pursuant to
 19 Federal Rule of Civil Procedure 37, however, RGIS fully complied with its disclosure obligations
 20 under Rule 26 because these manager declarations were submitted to impeach the 179 new
 21 declarations Plaintiffs' filed in their Response to RGIS' Motion to Decertify Plaintiffs' FLSA
 22 Collection Action. As such, there are no evidentiary grounds to take the drastic step of striking
 23 these declarations from the record.

1 **III. RELIEF SOUGHT**

2 For the foregoing reasons, RGIS requests that the Court overrule Plaintiffs' evidentiary
3 objections.

4 Dated: December 19, 2008

DRINKER BIDDLE & REATH LLP

5 By: Cheryl D. Orr

6 Cheryl D. Orr
7 Attorneys for Defendant
8 RGIS LLC